



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 26, 2004

Ms. Lona Chastain
Assistant General Counsel
Texas Workforce Commission
101 East 15th Street
Austin, Texas 78778-0001

OR2004-0561

Dear Ms. Chastain:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 194312.

The Texas Workforce Commission (the "commission") received a request for "access to all background materials, preambles and rules being presented to the Texas Workforce Commission for the post-docket portion of the Nov. 4 meeting."¹ You inform us that some of the requested information has been made available to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.111, 552.117, and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹We note that you have construed the request to include materials presented by commission staff to the Commissioners in preparation for the November 4 meeting, as well as all drafts presented to the staffs of the Commissioners for the purpose of preparing each Commissioner for this meeting.

²You raise section 552.136 of the Government Code with respect to certain e-mail addresses. We note, however, that the Seventy-eighth Legislature recently repealed section 552.136 of the Government Code as it applies to the confidentiality of e-mail addresses. *See* Act of May 23, 2001, 77th Leg., R.S., ch. 545, § 5, 2001 Tex. Gen. & Spec. Laws 1036, repealed by Act of May 21, 2003, 78th Leg., R.S., ch. 1276, § 9.013, 2003 Tex. Sess. Law Serv. 4218. The section was duplicative of section 552.137. *See* Act of May 21, 2003, 78th Leg., R.S., ch. 1276, 2003 Tex. Sess. Law Serv. 4218. Accordingly, we will address your claim with respect to section 552.136 under section 552.137.

Section 552.111 excepts from public disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” The purpose of this exception is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov’t Code § 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 615 at 5. If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information may also be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office also has concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter’s advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You contend that several categories of documents are excepted from disclosure under section 552.111. We will consider each category of documents separately, but we note at the outset your statement that all draft documents are intended for release in their final form. You explain that tab B1 consists of drafts of rules to be adopted in their final form and published in the Texas Register after approval by the Commissioners. In other words, the information under tab B1 consists of drafts of rules to be adopted and not the final version of the adopted rules. *See* Gov’t Code §§ 2001.029 (a state agency must consider public comment on a proposed rule), 2001.033 (a state agency order adopting rule must include a

reasoned justification for rule). You further explain that these drafts “articulate staff opinion as to how a rule should be considered and decided.” Based upon these representations and our review of tab B1, we conclude that the drafts under tab B1 may be withheld from disclosure under section 552.111 in their entirety.

You state that the document under tab B2 is the draft of a letter to be sent to the U.S. Department of Labor (“USDOL”) in its final form. You explain that the USDOL has solicited comments regarding a proposal to survey customers of one-stop services. You inform us that the commission administers one-stop services in Texas and therefore has a policymaking interest in the USDOL proposal. Because the Commissioners determine the policy direction the commission will take with regard to this issue, you explain that the draft letter to the USDOL will not be final until approved by the Commissioners. You state that the draft letter represents the advice, recommendations, and opinions of commission staff to the Commissioners regarding this policymaking issue. Under these circumstances, we conclude that the draft under tab B2 is excepted from disclosure under section 552.111.

The document under tab B3 represents the recommendations of commission staff regarding modifications to the five-year plan for the administration of the Workforce Investment Act. You explain that this document presents a policymaking issue for the Commissioners and as a draft is subject to revision. We agree that the draft document under tab B3 is excepted from disclosure under section 552.111.

Tab B4 is a concept briefing paper consisting of several versions of rules to be considered for proposal and e-mails. We note that the briefing paper contains only drafts of proposed rules and not the proposed rules themselves. *See* Gov’t Code §§ 2001.023(b) (a state agency must file notice of a proposed rule with the secretary of state for publication in the Texas Register), .029(a), (b) (a state agency must give the public the opportunity to comment on a proposed rule). You explain that the briefing paper represents the recommendations of commission staff on issues related to career schools and colleges. Having considered your arguments and reviewed the information at issue, we conclude that most of the information under tab B4 may be withheld from disclosure under section 552.111. However, the e-mails under tab B4 contain factual information that must be released. We have marked the factual information accordingly.

The document under tab B5 contains the recommendations of commission staff regarding performance awards for Workforce Development Boards to use in providing workforce training. You explain that because there are limited funds available for workforce training, the Commissioners must make a policy decision about how to use the funds. We agree that most of tab B5 may be withheld from disclosure under section 552.111. We have marked factual information that the commission must release.

Finally, you contend that the documents under tab B6 contain information that is excepted from disclosure under sections 552.117 and 552.137 of the Government Code. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security

numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code.³ You have marked the home addresses and telephone numbers of two individuals employed by state agencies other than the commission. Because these individuals are not employees of the commission, we find that section 552.117 does not apply to their home addresses and telephone numbers in this instance. You have also marked the home telephone number of a commission employee. If this employee timely elected under section 552.024 to keep her home telephone number confidential, the commission must withhold this information from disclosure pursuant to section 552.117.

The submitted information also contains e-mail addresses obtained from the public. Section 552.137 makes certain e-mail addresses confidential. Section 552.137 provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

³In Senate Bill 1388, which became effective on June 20, 2003, the Seventy-eighth Legislature amended section 552.117 of the Government Code by adding "(a)" to the relevant language of this provision. See Act of May 30, 2003, 78th Leg., R.S., ch. 947, 2003 Tex. Sess. Law Serv. 2822 (Vernon) (to be codified as an amendment to Gov't Code § 552.117).

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78th Leg., R.S., ch. 1089, § 1, 2003 Tex. Sess. Law Serv. 3124 (to be codified as amendment to Gov't Code § 552.137). Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The commission must, therefore, withhold the marked e-mail addresses of members of the public under section 552.137.

In summary, with the exception of the factual information under tabs B4 and B5 that we have marked for release, the commission may withhold the information under tabs B1 through B5 from disclosure pursuant to section 552.111 of the Government Code. The commission must withhold the marked home telephone number of the commission employee pursuant to section 552.117, if the employee timely elected to keep this number confidential. The commission must also withhold the e-mail addresses we have marked pursuant to section 552.137 of the Government Code. All other information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor

should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Karen Hattaway
Assistant Attorney General
Open Records Division

KEH/sdk

Ref: ID# 194312

Enc. Submitted documents

c: Mr. W. Gardner Selby
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Austin, Texas 78704
(w/o enclosures)